

Tenure of Sick Person on His Property from View Point of Five Religions

Forouzan Alaei Novin and Fateme Khamse

Islamic Azad University-Karaj Branch, Iran

ABSTRACT

Tenure of near to death sick person on his property is in two ways: A) Gratuitous tenure; B) Un-gratuitous tenure. In gratuitous tenure, sick person can tenure on the property like a healthy person and there is no disagreement on it, but un-gratuitous tenure or tenure of sick person include definite tenure or transferring property to others, such as giving gift, donation, freeing slave, debtor's solvency, etc. or giving something and receiving very less amount of it in return, which leads to impairment loses to heirs. There are many discussions about the second form of tenure; some scholars and jurists consider it as will and apply all of its condition. The other form of it is confession of the sick person. Confession of sick person is influential when the disease doesn't lead to death. This confession is practical only in one third of the property, whether in favor of one of the heirs or in favor of another person, or in one third of the property or more than that. In that case the confessor is stigmatic and more than one third of his property depends on the permission of heirs. Consequently, tenure of near to death sick person on his property include will, gift, selling property for less than its real value, dedication, and confession. Scholars believe this tenure is not practical for more than one third of the property.

KEYWORDS: Sick, Tenure, Property

1. INTRODUCTION

To date the property has been recognized as a critical subject in tenure of near to death sick person [1]. To better understanding the main problem and special subject we presented two main research questions and other explanation in manner of questions.

1. What is tenure of sick person in property?
2. What is the limitations and authority of tenure of near to death sick person on his property?

There is no thesis studying this field and it's the first thesis presented in this subject. Therefore, the presented study is a theoretical research using reasoning and rational analysis method based on library studies, information banks and internet.

What is disease? Lexical meaning of disease is to be sick. In jurisprudence, near to death disease means an illness that leads to death of sick person or disables him to do his ordinary works [2].

Who is sick person? Here, sick person is anyone whose disease leads to death or puts his life in danger. When the sick person recovers from illness and then die, his transactions and gifts is like a healthy person [3].

1.1. Different types of disease

a. Dreaded disease: that is also classified as: 1) Near to death disease and 2) Diseases dreadful in that level; but tenure on the property is during this disease.

b. Un-dreaded disease

Disagreements are on un-dreadful disease that leads to death, and whether in this condition tenure only belongs to one third of property or its whole.

1.2. The concept of tenure of sick person in property

Tenure means to keep promise, doing something and giving certainty to it. If a disease is not leading to death, the sick can tenure on his property like a healthy person, and his tenure is on all of his property, unless he has testate on his property for after death. Tenure is not influential for more than one third of the property, as the healthy person [4].

If disease of sick person leads to death, and the disease is dreadful and fatal, tenure on more than one third of property is not accurate, but legally he can possess one third of his property. Possessing more than one third is accurate and heirs can't change it when exchanging for equivalent price not less than that, sell the property more than one third of it, or rent it for equivalent remuneration [5]. If the tenure is gratuitous, it is suspended to something else or not suspended.

Promised tenure is tenure during life and disease, and is not suspended to after death, like will [6]. For example, giving some part of property to one person or for charity is called tenure of sick person [5]. Donation,

giving something and receiving very less amount of it in return, and any action that ends in decreasing property and bequest is called promised tenure [6], and religious scholars have debate on it.

Khomeini believe that some scholars, like Fazel, Shahidin, Alkarki, who believe sick person can't tenure on more than one third of property except to permission of heirs, refer to narratives such as Ali ibn Aghabei abi Abdollah (AS) in the answer of the question that "when a person is dying and frees all his property and has nothing more than that and heirs don't accept it, what is the verdict?" he replied "the property is not freed unless one third of it". Imam Khomeini (as) considers tenure of sick person from all of the property, whether more than one third of it or less [4]. Shahid Thani says: "regarding many narratives, directly or indirectly it is implied that sick person can't tenure on more than one third of his property" [5, 6]. Allameh Helli believe "sick person is not allowed to tenure on more than one third of his property" [7]

There is no disagreement between scholars on paying khoums, zakat, and atonement from the whole property. Malek says: when a sick person gets married, he can't give more than one third of his property as equivalent dowry. But he is allowed to sell and buy, borrow and loan money. But after his death his tenure is accepted only on one third of his property, but while alive, his tenure can be on all his property [8].

1.3. Tenure of sick person on his property as total gift or not gift:

First part of this tenure is giving unnecessary gift. Tenure in witnessing is the witness confesses without permission of the ruler. Tenure in swearing without the permission of the ruler is limited in Allah's right but unaccepted in people's right.

Tenure of sick person include gift, charity, dedication, tenure on less than equivalent price or purchasing for more than equivalent price, for example, when the sick person is near to death, tenure of the sick person is not on more than one third of his property, based on Imami scholars.[9]

The second one is contract of sick person with others, some scholars believe this is a kind of tenure but others believe this is a kind of contract and exchange.

In the first part, scholars discuss whether the tenure is in whole the property or in one third of it, and at the death if the tenure is more than one third, and heirs disagree with it, the tenure on more than one third is not accepted. Any of the scholars have reasons for their ideas, but most of them agree that tenure is like will and is allowable in one third of the property and heirs permission is needed for more than that [12].

2. AGREEMENT ON TENURE, DONATION AND EPILOGUE DONATION

In some cases, the sick person may donate some of his property during his illness but left some to heirs. In this case, which of them should be considered first? Tenure and or donation.

If the sick person tenure in the property during his illness and then testate to do something after his death, first the tenure should be considered [5]. Furthermore, some scholars have emphasized that donations should be considered first [5], since they are considerable during his life but will is only considerable after the death. Therefore, it should be prior to the will even if it comes later. Sheikh Tousi says: "if both donation and tenure is more than one third of the property, then tenure is prior to donation". Shafei also believe in it, but Abu Hanifeh believes none of them are prior to the other and they should be considered equal, since they are credible only in one third of the property. For instance, if the sick person releases his slave near the death and then will about that slave, in that case his freedom is prior to the will since it is tenure in the property [10].

Imami, Shafei, Hanabeleh scholars believe one action is prior to the other, and if one third of the property is not sufficient for that, with the permission of the heirs the tenure can be considered from whole property [11].

In a narrative from Mohammad ibn Yaghoub Koleini, Mohammad ibn Ali ibn Babouyeh, and Mohammad ibn Hassan Tousi, they state from Aba Abdollah (AS) [32,33,34,35] that property owner can do whatever he wants until he is alive.

2.1. The similarities between will and tenure of sick person

The difference between tenure of sick person and will is that will belong to after death, while tenure is before death. For instance, the sick person has vow if God give him a boy, he will slaughter a sheep and after his death God giveshim a son, in this case it is considered as tenure. In the book "Moghani" in Hanabeleh and "Tazkerat" in Imami religion it is said tenure of sick person and will are common in five things, and are different in six. Allameh Helli, author of the book "Tazkerat" states them as follow:

Similarities include:

1. Each of them is valid only in one third of the property or needs permission of the heirs.
2. Imami scholars believe for the heirs tenure is like will and is from whole property, but four other religions think contrary.
3. Requit of both of them is less than giving charity during health.
4. Tenure limits the will on one third of the property
5. After death they can't belong to more than one third of the property not before death.

2.2. Differences between tenure and will include:

1. The testator can change the will, but when sick person has donated something during disease, he can't change it, and deviation of it depends on death.
2. Accepting or denying tenure during life should be immediate, but accepting or denying will, should be after death.
3. Tenure needs some conditions, such as knowing the truth of the gift, but will needs no conditions [12].
4. Tenure is prior to will, and if one third of the property is less than tenure and will, the will is prior to donation, and Imami, Hanafieh and Shafei scholars agree with it [13]
5. If one third of the property is less than tenures, Shafei and Hanabeleh believe it is acceptable, but if one third of the property is less than will, this lack is influential on all levels of the will, and Imami scholars believe they come after each other [13]
6. If the sick person don't give his donations to donated person before his death, the heirs have authority to give the donations or not, but if it is mentioned in the will, the heirs are obliged to give it.

Part 6 of the differences is not mentioned in the book "Tazkerat" [13] and it can be ignored, as Allameh Helli believe it is appropriate [13], since tenures of the sick person include various issues such as gift, purchasing, debt, transactions, etc. [13].

2.3. Tenure of sick person from View point of Sunni scholars

2.3.1. Shafei scholars: There are various have statements about this issue, briefly described in the follow. Selling of sick person is like selling of healthy person and all of the rules are applied for sick person. This is when the sick person has sold it to equivalent price, whether for the heir or others. In this base, near to death sick person can't sell something to his heirs, since it is forbidden and his selling is like a child selling something. It is like dealing with others when this selling is not more than one third of the property. Prevention of selling things is like accepting not to sell it. Selling property during illness is like will, and can't be sold to the heirs. Selling property to others for less than its real value is invalid and for this kind of selling is acceptable for one third of the property.

If during disease of a near death person something is donated, it is from one third of the property and this donation is in different forms such as selling for less than real value, gift, charity, dedication, giving debts of others and forgiving a criminal, and if it is during his health, it is considered from all of the property, and all scholars agree with it, but if the selling is in the near to death disease, it is considered from one third of the property. Most of the scholars believe donations during near to death disease are like will:

- They should be less than one third of the property, and for more than that permission of heirs is needed;
- Heirs are not allowed to accept it unless all of the heirs accept it.
- Requit of donations is less than charity in healthy time.
- Donations from one third of the property hinder will.
- Tenure on more than one third of the property is acceptable in death time, not before or after that [14].

2.4. Difference between will and donation:

1. Donations are given from donor and cannot be returned even in large amount, and heirs can do nothing about it, but in will, the testator can return it because tenure on the property is until death, hence, heirs can deny accepting more than one third of the property, but it is not allowed in near to death disease.
2. Accepting or denying gift is valid during the life time of the gift donor, but accepting or denying will is invalid except after death.
3. Donation needs some conditions but will don't has any condition.
4. Shafei scholars and most of the scholars such as Abu-Hanifeh and Abu-Yusef believe donation is prior to will [14].

In Shafei, the sick person should have two conditions: 1) his disease should be near to death, if during disease he has donated something and then get recovered and then die his donations is like healthy person since this type of illness is not considered as near to death disease. 2) The illness should be dreadful.

2.4.1. Disease is classified as:

1. Non-dreadful disease, such as eyesore, toothache, and less fever. This type of disease is not dreadful because there is no possibility for death.
2. Continuous diseases such as leprosy and tuberculosis that make sick person to sleep in bed are considered as dreadful diseases, even if the disease don't make sick person to go to bed
3. Disease that make sick person to death earlier, and sick person is looking for his death, or his mind is disturbed, in this case his word is not valid because of his mind turbulence. Otherwise, his tenure is accurate and is considered from one third of his property.
4. Dreadful diseases that makes not the sick person's death earlier but there is fear of it, such as pleurisy, thin the blood, heart pain, chest pain, etc. whether with fever or not [14].

2.5. Tenure of sick person from view point of Hanafi scholars:

In Hanafi religion, gift and charity of near to death sick person is not accepted unless it is received. Ibn Laili, a well-known Hanafi scholar also accepts non-received donation, because he considers it as will that is not measured from one third of the property. Therefore, will is emphasized by the death, not invalidated; gift is also like will. Also it has been said that when the heir got sick, inheritance rights belongs to two part of one third of the property, and for maintaining the heir's right, the gift is taken from one third of the property. For instance, if the gift giver has only a house and gives it for gift, after his death this gift would be decreased from one third of the house and other two third of the house belongs to the heirs, this is applicable for other properties, whether divisible or non-divisible [15].

Substitution during disease is like will, but it is invalid when the heir or some representative of heir is substituted, and when others are substituted, for more than one third it is invalid. Free ownership of the property is valid during disease, unless the sick person gets well, and in this case any tenure on the property is accurate. Near to death disease is any disease that leads to death of sick person. When the sick person substitute one person for some amount of the money and the sick person has debt that is more than his total property, in this case all the property belongs to the debt and the donation is included in tenure of sick person's rule on the property. Gift and debt of healthy time is prior to disease time. If the substitution of the sick person is during his disease and there is no debt on sick person, this substitution is from one third of the property, because it is considered as tenure of sick person on his property and the tenure is measured from one third of the property [15].

Heirs right on the property is after his death, but in near to death disease the sick person is prevented to tenure on property of the heir, but before his death the heirs are forbidden to pick their right from the property [16].

The rule of near to death disease is exceptional and approach of the death will not cause the transfer of the property during sickness. If the heirs accept the tenure of sick person during his disease, it is not the case in after his death. Hanafi scholars believe after death qualified people are allowed to accept the will, that the heir should not be children [17].

2.6. Tenure of sick person from view point of Maleki scholars

In Maleki religion, tenure of sick person include gift, selling property for less than its real value, giving charity, dedication, forgiving a debt and forgiving a criminal needs property. When it is done in healthy time of the person, it is measured from the total of the property, and there is no disagreement among scholars. But if it is done during a near to death disease, the tenure is considered from one third of the property [17]. To follow the rules of near to death disease, two conditions should be met: 1) the death is related to disease so if the sick person gives a gift during his disease, then gets well and then dies the gift is considered as donation of a healthy person, because it is not near to death disease. 2) The disease is dreadful.

2.6.1. There are three types of disease:

1. Non-dreadful disease, such as eyesore, toothache, and less fever. This type of disease is not dreadful because there is no possibility for death.
2. Continuous diseases such as leprosy and tuberculosis that make sick person to sleep in bed are considered as dreadful diseases.
3. Disease that make sick person to death earlier, and sick person is looking for his death, or his mind is disturbed, in this case his word is not valid. Otherwise, his tenure is accurate and is considered from one third of his property. Donations in near to death disease are prior to will if and are considered from not more than one third of the property [17].

It was asked is it appropriate to give the palm farm to someone in order to share its yields? In Maleki religion it is acceptable if it is not more than one third of the property, unless it would be measured from one third of the property [18]. Another issue is to be representative of sick person; it was asked is it acceptable to be representative of sick person on his property? And the answer is that it is considered for one third of his property. If someone is representative of the property of a sick person but is under debt, is this representation true? Answer: it is better to avoid substitution since debt is prior to substitution, and substitution is from one third of the property but debt is from whole the property, and the whole is prior to one third. If a person has will one third of his property to another person and then borrow something that in return needs whole of his property, Maleki scholars believe the will is invalid.

2.7. Tenure of sick person from view point of Hanbali scholars:

Unlike other Sunni religions, Hanbali religion has a brief look at the issue in the book "Al-Moghni Ala Mokhtasar Al-kharghi" of Ibn Ghodameh [14], and "Badaye al-Sanayeh" of Kashani [19]. In these books God says: "Charity is for you on one third of your property up to the end of your life.... Will on the property is requiring property at the death time, and at this time heir's right is on the property, except one third of it, so, having will on more than one third of the property intrudes heirs' right and is not acceptable without their permission. Whether the will is during sickness or in healthy mode, because will is required after death, so the death time is valid not the time of saying the words [14, 19].

2.8. Shia Scholars

As it was mentioned before, unlike Sunni scholars, there are disagreements on tenure of sick person from view point of Shia scholars. Some well-known scholars are for the limitation of the sick person to one third of the property, and others agree the sick person is like a healthy one and has unlimited access to the property. Their reasons are as follow:

2.8.1. Reasons of scholars believing on tenure of sick person on whole of the property:

Early Shia Scholars [7] and most of the current scholars [4,20,21] follow this theory. The author of the “Javaher al-Kalam in explanation of Islamic rules” [21] has written:

Some of the scholars, such as Theghat Al-Islam Koleini [32] and Sheikh Sadough Ali Ibn Babouyeh [35], Hor AAmeli [30] and Tabatabaei Saheb Riaz [29] believe there is no limitation for sick person in his tenure on the property and like a healthy person they can do whatever they want with their property and the tenure is considered from whole of the property not one third of it [23]. Saheb Riaz [29] also said this idea is common among most of the Shia scholars and prophet Mohammad (PBUH) said *الناس مسلطون على اموالهم* “people are dominant of their own property”. Therefore, it is the base that people can do whatever they want with their property, unless something contrary to this idea is proved. Advocates of this idea have the following reasons to prove their ideas:

1. Permission principle: Based on the permission principle, people, sick or healthy, can have any tenure on the property, for instance, selling property, giving it as a gift, giving it to charity, dedicating it or giving it to inheritance. There is no limitation on tenure and it is for all of the property not one third of it [25].

2. Dominance principle: Dominance principle taken from *الناس مسلطون على اموالهم*, is one of the most common principles among scholars referred to in most parts of the religion. This principle considers the property owner as the dominant and master of his property that can have any legal tenure on the property, for instance to sell the house, or donate some money to a person, or dedicate his property, and is free in the type of tenure and can do whatever he wants, for example build a house in his land, or change it to store, school, sport center, educational or recreational centers, and no one is allowed to make trouble, and others can tenure on his property with his permission [25].

2.9. Documentation of dominance principle [26]

For these principle four reasons (Book, Sunnah, Consensus and Wisdom) were used:

2.9.1. Book (Quran):

There are different verses representing the property owner is totally dominant to his property and can have any tenure he wants and no one is allowed to make trouble for it. Tenure of others depends on his consent, and this is the meaning of dominance principle. The following verses indicate the statement:

1. *يا ايها الذين امنوا لا تاكلوا اموالكم بينكم بالباطل الا ان تكون تجاره عن تراض منكم* (An-Nisa, 29) [27]

“O ye who believe! Eat not up your property among yourselves in vanities: but let there be amongst you traffic and trade by mutual good-will”

2. *وان اتوا اليتامى اموالهم ولا تتبدلوا الخبيث بالطيب ولا تاكلوا اموالهم الى اموالكم انه كان حوبا كبيرا* (An-Nisa, 2) [27]

“To orphans restore their property (when they reach their age), nor substitute (your) worthless things for (their) good ones; and devour not their substance (by mixing it up) with your own. For this is indeed a great sin”

Verses 188 and 279 of al-Baqarat and verses about heritage, will and other contracts represent this principle. [27].

2.9.2. Sunnah

There are different narratives emphasizing this principle:

1. Well-known Hadith of Prophetic says: *ان الناس مسلطون على اموالهم* [28], “indeed, people are dominant to their properties”. This hadith is stated in the book “Bahar al-Anvar” of Majlesi, and most of the religious scholars have referred to it and is common among Sunni and Shia scholars, as Saheb Riaz have said [29].

2. In another Hadith, Imam Sadeq was asked: *قال: هو ماله لقرابته؟* (a man that has children can give his property to his relatives?, Imam answered: yes, it is his property and he can do whatever he want until his death”

3. Another Hadith stated from Abi Basir says the same hadith of Imam Sadeq but adds: *ان لصاحب المال ان يعمل بماله ماشاء مادام حيا ان شاء و هبه و ان شاء تصدق به و ان شاء تركه الى ان ياتي الموت* [30]

The property owner can do whatever he wants on his property until his death, he can give it as gift, donate it, give it to charity or maintain it to the heir

4. Prophet Muhammad (PBUH) said: *لا يحل مال امر مسلم الا بطيب نفسه* [31]

It is not allowed others to tenure in the property of a Muslim except with his consent.

2.9.3. Consensus:

According to jurisprudence books from ancient to now, it becomes clear that all the scholars agree on this principle, and some believe it is base of the principles and all have referred to it. For instance, Sheikh Tusi in his

book “Khalaf” [33], Mohaghegh Thani in the book “Jame al-Maghased about Hoarding [36], Saheb Javaher in “leadership permission from the ruler” [22] and about hoarding [22], and others have used this principle and consider it as certainties. However, all scholars have agreed on the content of this principle and it is undoubting.

2.9.4. Wisdom and principles of intellectuals

This principle is mainly a rational principle and from ancient time to now intellectuals were acting based on this principle and there is no difference between theologians or non- theologians. Even materialists believe they have total ownership of their properties, except in non-legal issues, and if somebody does not pay attention to this rule, or even doesn't discuss it in a part of their book, they serve this rule in act. This is a natural rule that rooted in deep the heart, and because Sharia rules are adapted with natural rules, sharia has accepted this rule. Therefore, content of the rule is not an Islamic one, but a mental and natural rule that sharia has also accept it.

Based on the dominance rule, it is concluded that whoever owns a property, has the dominance of this property and can do whatever legal he want on this property. No matter this tenure is formative, practical (such as eating, drinking, wearing, etc.) or legal (such as selling, giving to gift, donation, renting, selling for less than its real value, etc.) [37].

2.10. Referring practical principles

Practical principles used for proving the ideas are called survival principle. The principle that used to prove the accuracy of tenure in more than one third of the property without permission of the heirs, or inaccuracy of it and needing permission of the heirs is also survival principle [38].

2.11. Referring the ideas of scholars

The author of the book “Saheb Ketab al-Feqh” says: *و كيف كان فالقولان في المسألة مشهوران ذهب الى كل جملة من الاعظام و الروايات من كل جانب متواتر الان مقتضى الصنعة ان من الاصل كالمعال ملات حاله الصحة الان العمل بروايات المنعوب يجب اسقاط روايات الجواز، أما العمل بروايات الجواز فيبقى صحة امكان حمل المانع على الكراهة و نحوها و ان لم نقل بحبلها على المقيته و ان لم يكن ذلك الحمل بعيداً لموافقها لمذهب اكثر العامة كما عن العلامة في التذكرة و تبعه الوسائل و غيره و لذا كان الخروج من الاصل و صحة المنجزات هو الاشهر، حيث ذهب اليه الكليني و الصدوق و الشيخان و السيدان و القاضي و اكناء ادريس و البراج و سعيد و الابي و الاردبيلي و الخراساني و الحر عامليو الطباطبائي و صاحب الرياض و عن كشف الرموز نسبتته الى الاكثر و عن الرياض انه المشهور بين القدماء ظاهراً بل لعله لا شبيهه [39].* In this issue (release of the sick person) there are two ideas, both of them are well-known, and there are many narratives about them. It is better to say tenure of the sick person is measured from the total of the property like when healthy, because practicing the narratives that prevent sick person to tenure on his property invalidate the narratives about permission of tenure of sick person on the property. While, practicing the permission principle, makes prevent narratives unreliable. Therefore, based on the two narratives it is concluded that *من و الجمع مهما امكن اولي من* is reservation. It is narrated in “Tazkerat” of Allameh and other books, therefore, tenure on whole the property and accuracy of tenure of sick person on the property is more common, and this is stated by Koleini Sadough, Qazi, Children of Edris and Boraj, Saeid, Al-A’bi, Aradabili, Khorasani, Hor Ameli, Tabatabaei and Saheb Riaz, and many other scholars.

Most of the contemporary scholars have followed this idea and in “Tahrir al-Vasilat” it has been said: “tenure of sick person is measured from the total of the property, even in near to death disease” [4].

2.12. Advocates of tenure of sick person on one third of the property

There is another idea in contrast to the idea of limitation and prevention of tenure of sick person in his property. They believe sick person is not free to tenure on his property during illness, and his authority is limited during this time, this limitation is for preventing opportunists to illegally use this property, and on the other hand to protect legal heirs from loss on this condition. Therefore, some scholars refer to Hadith and narratives and believe tenure of sick person in this period is illogical or sentimental. They believe tenure of sick person in this period is limited to one third of the property, and for more than that they need permission of heirs.

In this regard, Seyed Mohammad Husseini Shirazi [39] states: *“أما القول بالمنع، فهو خير: المحقق و الفاضل، الشهيدين و الكركي، بل عن أبي علي و الشيخ في المبسوط و في اعسالك نسبتته الى الاكثر، بل نسبت الى عامر المتأخرين. و عن المفاتيح ان الاخبار به اكثر و أشهر و عن الشيخ في العتق انه المعروف بيننا، و عن الكركي ان النصوص به متواتره الى غير ذلك من الاقوال الى ذكرها شراح “الفاضلين. لمفتاح الكرامه و الجواهر و غيرها، بل في الجواهر: ان أقوال المانعين كالاجماع المنقول في الجحيه، خصوصاً بعد شهاده التتبع له Korki [40], Sheikh Tousi [10], Shahid Thani [36], have also referred and impute it to most of the scholars.*

3. CONCLUSION

Religious instructions are based on the interests on principle of the actions and they have never been ordained unplanned. Therefore, Islamic rules have right and corrupt roots that people's mind can recognized with experience. If Islam emphasizes qualification as pre-requisite of the contracts, make sure it is beneficial. And if God has forbidden it, so the aim of limiting person to tenure on the property is not debasement and destruction of human dignity, but it is beneficial, and maintains life and property of the people. And also prevents loses on the property

owner and its heirs. In Quran, God emphasized on saving and maintaining orphans (An-Nisa, 29), affection (ibid, 188, 279), necessity of being aware of their affairs (ibid, 188, 279), right (ibid, 4), and justice (ibid, 2).

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